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Supreme Court of the United States

OCTOBER TERM, 1993

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF OF THE CITY OF LOS ANGELES, CALIFORNIA, AND THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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BRIEF OF
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INTEREST OF THE *AMICI CURIAE*

Amicus curiae the City of Los Angeles, California, is a municipality that franchises and regulates cable television operators within the City. The Alliance for Communications Democracy ("Alliance") is a membership organization comprised of nonprofit access corporations throughout the country, which have helped thousands of individuals use public, educational, and governmental ("PEG") access channels on cable television systems.[1] *Amici* believe that Sections 4 and 5 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. §§ 534, 535 ("1992 Cable Act") — the so-called must-carry provisions — are constitutional, and that the Court should affirm the district court's decision.

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[1]Written consent to the filing of this brief has been obtained from the parties to this case. Copies of the consent letters accompany this brief.

Los Angeles, which participated as an *amicus* below, is the defendant in another case raising First Amendment challenges to cable television regulation, which was before this Court earlier. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986). That case is now pending before the United States Court of Appeals for the Ninth Circuit, where it has been briefed and argued. *Preferred Communications, Inc. v. City of Los Angeles*. Nos. 91-55625, 91-55665 (9th Cir. filed May 9, 1991 and May 20, 1991). In *Preferred*, the plaintiff attacks on First Amendment grounds virtually every aspect of Los Angeles' cable television franchising process, including the requirement that a cable operator set aside two channels for public use, two channels for use by educational institutions, and two for use by the city government.

This Court declined in *Preferred* to articulate "the proper standard for judging First Amendment challenges to a municipality's restriction of access to cable facilities," *id.* at 496, because of the lack of a thoroughly developed record. The Court cautioned that "[w]e think that we may know more than we know now about how the constitutional issues should be resolved when we know more about the present uses of the public utility poles and rights-of-way and how respondent proposes to install and maintain its facilities on them." *Id.* at 495. The record in *Preferred* now addresses these factual issues, while the record in the instant case does not.

The Alliance, which also participated as an *amicus* below, is a nonprofit organization dedicated to ensuring that the public has some opportunity, albeit limited, to make use of television, the most powerful and popular communications medium of our time. "Access" channels, as

the name implies, are channels set aside on a cable system for noncommercial use by the general public, as well as by educational and governmental institutions. 47 U.S.C. § 531. Without PEG access channels, the public, and public institutions, would be virtually locked out of the television medium, despite the fact that the operation and profitability of a cable television system is made feasible only by virtue of the fact that a cable system is constructed on rights-of-way belonging to the public.

Members of the Alliance have assisted thousands of citizens in using PEG access channels, and using the television medium for communication.[2] Thus, the Alliance has firsthand knowledge as to the manner in which PEG access channels function, and their value in assuring that members of the public have an opportunity to communicate over cable systems.

Amici believe that the three-judge district court was correct in holding that the must-carry rules are constitutional, and that the judgment of the district court should be affirmed. In addition, *amici* are concerned that the Court not resolve the constitutional issues posed by the must-carry rules in a way that would inadvertently impinge on the City's ability to franchise and regulate cable television systems within its jurisdiction in the public interest, as well as the rights of PEG access users and

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[2]The Board of Directors of the organization is composed of representatives of nonprofit access corporations in Montgomery County, Maryland; Grand Rapids, Michigan; Columbus, Ohio; Tucson, Arizona; Chicago, Illinois; Boston, Massachusetts; Honolulu, Hawaii; St. Paul, Minnesota; Multnomah County and Salem, Oregon; and Staten Island and New York City, New York.

viewers, when the justifications for such regulation are largely absent from the factual record now before the Court.

SUMMARY OF ARGUMENT

Municipal cable television franchising and regulatory authorities, such as Los Angeles, have significant interests in how cable television systems make use of scarce public rights-of-way. Unlike any private business other than the traditional public utilities such as telephone, gas, water, and electric power, cable television systems operate by virtue of placing hundreds of miles of distribution plant on public rights-of-way, public utility poles, and in underground facilities. This extensive and permanent use of public property distinguishes cable television from all other media, and underscores the wisdom of the Court's instruction in *Red Lion* that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969).

As the Court recognized in *Preferred*, 486 U.S. at 495, "First Amendment values must be balanced against competing societal interests." A wide range of such "competing societal interests" support and justify all aspects of cable television regulation, including municipal franchising requirements and PEG access requirements. Most of those interests, however, are largely unaddressed in the factual record submitted by the parties here. Therefore, in deciding this case, and in articulating the appropriate First Amendment standard by which to judge the constitutionality of the must-carry rules, the Court should recognize that this record is largely silent on the First Amendment rights of PEG access users and viewers, as well

as the rights of municipalities to ensure that cable operators using public rights-of-way and the utility infrastructure serve the public, rather than purely private, interests. Therefore, this case should be addressed in a manner that does not inadvertently curtail these other important societal interests, including the First Amendment rights of PEG access users and viewers.

In particular, cable's distinctive and unique use of public rights-of-way and the public utility infrastructure demonstrates that appellants are wrong in urging the Court to adopt for cable television the same First Amendment standards that traditionally have been applied to the print media. Rather, *amici* suggest that the Court should look to forum analysis to provide the appropriate standard by which to judge the constitutionality of cable television regulation, and should conclude that the public utility infrastructure used by cable operators is a nonpublic forum. Alternatively, the Court should fashion a First Amendment standard specifically for cable television that recognizes the unique attributes of cable as a distribution medium, including cable's comprehensive use of public property. Since the must-carry rules permit a cable operator to retain control over the vast majority of channels on a cable system — indeed, far more channels than any other user of the system — the must-carry provisions are constitutional.

ARGUMENT

The Supreme Court has made clear that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 386 (footnote omitted); *accord Preferred*, 476 U.S. at 496 (Blackmun, J.,

concurring). "Each method of communicating ideas is 'a law unto itself.'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs v. Cooper*, 336 U.S. 77, 97 (1949) (Jackson, J., concurring)). After all, "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers." *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring). Similarly, the nature of cable television is unique, as are the "values, abuses and dangers" it presents.

In enacting both the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 *et seq.*, ("1984 Cable Act"), and the 1992 Act, Congress looked carefully at the nature of cable television, as well as the "values, abuses and dangers" that the medium and the technology bring. Although appellants urge the Court to disregard Congress' findings in evaluating their First Amendment claims,[3] the Court must indeed take the findings of Congress into account in reviewing the constitutionality of Sections 4 and 5. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 331 n.12 (1985). As the Court has explained:

> That is not to say we "defer" to the judgment of the Congress and the Commission on a constitutional question, or that we would hesitate to invoke the Constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression. The point is, rather, that when we face a complex problem with many hard questions and few easy answers we do well to pay careful attention to how the other branches of Government have addressed the same problem.

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973).

[3]Brief for Appellant National Cable Television Association, Inc., ("NCTA") at 38-39, Brief for Appellants Turner Broadcasting System, Inc., *et al.* ("Turner Brief") at 38 & n.63.

Congress concluded in 1984 and reaffirmed nearly a decade later that the unique characteristics of cable television not only allow, but indeed necessitate, three forms of access to this particular medium: The must-carry rules for local broadcasters, the PEG access rules for the general public, and for educational and governmental institutions, and commercial leased access for other users, 47 U.S.C. §§ 531, 532, 534 & 535. While PEG and leased access channels are supported by important societal interests that are distinct and additional to the interests justifying the must-carry rules at issue here, the fact remains that all three forms of access to the cable television medium stem from cable television's unique "nature" — a local broadband communications distribution network, located on public property, with bottleneck characteristics. Each form of access is thus specifically tailored to address the "values, abuses and dangers" that characterize the cable medium.

I. MUNICIPAL CABLE FRANCHISING AUTHORITIES SUCH AS LOS ANGELES HAVE SIGNIFICANT INTERESTS, NOT REPRESENTED ON THIS RECORD, IN ENSURING THAT THE PUBLIC RIGHTS-OF-WAY USED BY CABLE SYSTEMS SERVE THE PUBLIC INTEREST.

Although appellants readily concede that cable systems inherently use public rights-of-way, and that municipalities'

interests in how cable systems use their rights-of-way[4] accordingly give them authority to regulate that use, appellants ignore the magnitude and permanence of cable's comprehensive use of that scarce public property. But it is this extensive, permanent use of public property that distinguishes cable from other media, and that underlies the policy decisions Congress made in enacting the 1984 and 1992 Cable Acts, including the provisions for must-carry and PEG access channels.

The installation and operation of a cable television system inherently involves significant and long-term occupation of valuable public rights-of-way. Like an electric, telephone, water, or gas system, a cable television system consists of a permanent street-by-street, house-by-house distribution system of hundreds of miles of cable and equipment installed on utility poles and in underground utility conduits. The utility poles and underground conduits, as well as the property traversed by aerial cable wires, are located on or under public streets and in rights-of-way held by a city or other local government in fee or through permanent easements. In Los Angeles, for example, cable systems occupy approximately 6,500 plant miles of municipal rights-of-way and utility infrastructure. No other private business in the City even approaches this level of ongoing and preclusive use of City property, other than the traditional public utilities. Each of those utilities, of course, is comprehensively regulated in the public interest.

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[4] *See, e.g.*, NCTA Brief at 31; Brief for Appellant Time Warner Entertainment Company, L.P. ("Time Warner Brief") at 33, 37, & 38.

Plainly, cable systems' use of scarce public rights-of-way differs not only in scope, but in kind from that of other media, such as newspapers. In enacting the 1992 Cable Act, Congress recognized that, in contrast to the print media, "cable must be awarded a franchise in order to operate and, similar to the telephone system, it must use governmental property to string its wires, lay its cable in ducts, and obtain necessary rights of way." S. Rep. No. 92, 102d Cong., 1st Sess. 51 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1184 ("Senate Report"). As the Tenth Circuit similarly has noted:

> To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails.

Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1377 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). Likewise, the Seventh Circuit has specifically distinguished cable from other media on the ground that "cable television involves . . . interference with other users of telephone poles and underground ducts." *Omega Satellite Prods. Co. v. City of Indianapolis*, 694 F.2d 119, 127 (7th Cir. 1982).

Moreover, while there are no physical limitations to the number of newspapers that may be published in a community, the public rights-of-way and utility infrastructure cannot physically accommodate all who

might wish to use them.[5] Appellants are disingenuous in asserting that "the physical capacity to accommodate additional cable systems exists" (NCTA Brief at 31), and that "in virtually every community, it is physically possible to have multiple cable systems . . . ." (Time Warner Brief at 33). In fact, utility poles and underground conduit can no more accommodate an infinite number of cable systems than they can accommodate an infinite number of telephone, electric, water or gas distribution systems.

Indeed, the cable distribution medium is, if anything, far more scarce than the broadcasting medium. In the Los Angeles area, for instance, there are at least twenty television broadcast stations. The record in *Preferred*, in contrast, makes plain that the City's existing utility infrastructure could physically accommodate at most only two or a small, unspecified number of cable systems. Yet the law is clear that the scarcity of the spectrum used by broadcasters, which supports far more broadcast users than the utility infrastructure will support cable users, is sufficient constitutional justification to subject broadcasters to licensing and comprehensive regulation in "the public interest" under the Communications Act, 47 U.S.C. §§ 301 *et seq. See, e.g.*, *Red Lion*, 395 U.S. at 388-91; *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

Time Warner nevertheless asserts that "in any location where existing space on poles and ducts is limited, there is nothing that stops would-be cable operators from adding space by, for example, erecting higher or additional

[5] *See* Senate Report at 55, 1992 U.S.C.C.A.N. at 1188 (noting that "[c]ertainly, there are practical limits on the number of cable franchises which can operate in any community . . . .").

telephone poles or laying cables underground" (Time Warner Brief at 33 n.30). Perhaps Time Warner is correct that there are no technological obstacles that would bar a community from erecting utility poles reaching to the heavens or from condemning more and more private land on which to install new sets of utility poles or underground conduit. But aside from the economic and legal limitations that may exist, surely the First Amendment does not require a community to engage in such activity. To the contrary, as the Seventh Circuit held in a recent *en banc* decision, "no person has a constitutional right to erect or maintain a structure on the public way." *Graff v. City of Chicago*, No. 92-2352, 1993 WL 484167, at *4 (7th Cir. Nov. 24, 1993).

Moreover, as this Court recognized in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 816-17 (1984), the aesthetic interest in avoiding visual clutter, standing alone, may permit a city to limit the use of public property as a vehicle for communication. Given *Vincent*, surely there is nothing in the First Amendment that would require a city and its residents to endure the visual and economic burdens caused by more and more, taller and taller utility poles so that an unlimited number of cable operators may hang their wires in the public rights-of-way.

Furthermore, any use of a city's utility infrastructure for additional cable television systems prevents the space from being used for other purposes. The same public property — utility poles, underground conduit, and other public rights-of-way and easements — houses not only cable, but also electric and telephone wires; water, gas, and sewage pipes; and wires and equipment for a host of other municipal services, such as traffic signals and police, fire, and emergency communications networks. Particularly in a time

and place of rapid growth and development such as Los Angeles has faced in recent years, a municipality has a vital interest in conserving and managing the existing space in its utility infrastructure for future needs. Thus, a city could well conclude that sound management of its utility infrastructure requires it to reserve space on its utility poles for the time being so that anticipated growth in electrical or telephone service can be accommodated in the future.

The installation of each additional cable system also substantially increases the safety hazards that necessarily occur with the installation and maintenance of each system that is added to the utility poles, whether for distribution of electricity, telephone, or cable television. Safety risks increase for all utility workers, but particularly for those working on the electric or telephone systems, which are typically installed above cable on the poles, thus requiring workers on the uppermost systems to climb through the wires and equipment of the lower systems to perform any installation or maintenance work. Managing the utility infrastructure to plan future uses and to ensure safety is, of course, "the 'business of government'," *Graff*, 1993 WL 484167, at *9 (quoting *Chicago Observer, Inc. v. City of Chicago*, 929 F.2d 325, 329 (7th Cir. 1991)), which courts are peculiarly ill-suited to second-guess. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984).

Moreover, as Congress has recognized, cable television is also an economically scarce medium; that is, a medium in which demand can generally be satisfied at lowest cost by a

single provider.[6] Time Warner nevertheless contends that economic scarcity is irrelevant because alternatives to cable television exist and cable operators must be minimally responsive to their customers' programming interests to stay in business (Time Warner Brief at 33-34). But Time Warner ignores a critical characteristic unique to the cable medium: The convergence of economic and physical scarcity in a medium making comprehensive use of public property. Unlike a newspaper, a cable system derives economic power from a government grant of authority to place permanent physical plant in scarce public rights-of-way, a right that inherently cannot be granted to everyone. *Community Communications*, 660 F.2d at 1377-79 (finding that a cable television system, unlike a newspaper, derives its economic power from its use of public rights-of-way). As Congress found, cable systems have strong natural monopoly tendencies. Absent regulation, they are thus in a position to exercise the market power derived from their control of local distribution facilities on public property to abuse consumers and harm competitors.

This power is amplified by the significant additional economic advantages that the law specifically confers on cable operators but not on other media, such as newspapers. For example, federal law grants cable television companies the right to place equipment and wires on public and private

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[6] Senate Report at 12, 1992 U.S.C.C.A.N. at 1144 (noting that almost all cable operators possess significant market power); *id.* at 19, 1992 U.S.C.C.A.N. at 1151-52 (noting that cable operators use market power to charge higher than competitive rates); *id.* at 24, 1992 U.S.C.C.A.N. at 1156-57 (noting that cable operators use market power over conduit in streets to force programmers to give them exclusive contracts or sell interests in programming services).

property. 47 U.S.C. § 541(a)(2). Moreover, Congress has made clear that "[a]ny private arrangements which seek to restrict a cable system's use of such easements or rights-of-way which have been granted to other utilities" are "not enforceable." H.R. Rep. No. 934, 98th Cong., 2d Sess. 59 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4696 ("1984 House Report"). The 1984 Cable Act also benefits cable operators in other ways. For instance, the Act limits the franchise fees cities may charge and the services they may regulate, 47 U.S.C. §§ 541, 542 & 544, limits the circumstances under which a cable operator may be denied renewal of a franchise, 47 U.S.C. § 546, and entitles a cable operator to modification of its franchise obligations under certain circumstances, 47 U.S.C. § 545.

Because cable systems make such extensive use of local public rights-of-way and are economically scarce, municipalities like Los Angeles indisputably have significant interests — interests not presently before the Court on the record of this case — in ensuring that cable systems serve the public, as opposed to the operator's purely private, interest. Among those uniquely local interests are (1) conserving and managing the capacity of a scarce and vital resource, the city's utility infrastructure; (2) planning and coordinating for the efficient use of that infrastructure so that it will best meet the public's overall needs, now and in the future; (3) minimizing the disruption to public and private property resulting from the installation of a cable system; (4) minimizing the permanent visual blight caused by utility poles and wires; (5) ensuring that a cable system is constructed and operated in a safe and productive manner; (6) assuring that cable service is available to all city residents; (7) ensuring that a cable system makes use of

public property in an efficient and productive manner that maximizes the communicative potential of the system; (8) obtaining compensation for a franchisee's use of public property; (9) allowing public participation and input in granting franchises and in formulating economically feasible terms for franchises; (10) protecting the public from fraud and dishonesty by franchisees; (11) ensuring that a franchisee is responsive to the particular needs of the local community; (12) increasing information diversity; and (13) ensuring that the public and public institutions also have an opportunity to use the cable medium for communications.

In order to ensure that cable systems serve these significant interests, local franchising authorities such as Los Angeles impose or negotiate a variety of requirements for cable franchises. Most of these requirements, such as construction standards and insurance and bonding requirements, do not implicate First Amendment interests at all. Others arguably do, and could not be imposed on newspapers, which have entirely different "natures, values, abuses and dangers." *Kovacs*, 336 U.S. at 97 (Jackson, J., concurring). For example, a requirement that newspapers dedicate space for general public use, analogous to the PEG access requirements for cable television systems, would not be constitutionally permissible given the particular characteristics of the print medium. *Cf. Miami Herald v. Tornillo*, 418 U.S. 241 (1974).

Similarly, local franchising authorities typically require a cable franchisee to wire all areas of the community that have enough housing density to make a cable system economically viable. Universal service is required even though particular neighborhoods may be less affluent and less profitable for the cable operator, who might not choose

to serve the area if not required to do so. Such a universal service requirement — patterned on the requirement imposed on the traditional public utilities — would surely pose grave constitutional concerns if imposed on a newspaper.

In the cable context, however, these requirements are explicitly tied to the fact that cable operators, unlike newspaper publishers, build and operate their plants on property belonging to the public. Thus, it is one thing to suggest, as this Court did in *Miami Herald v. Tornillo*, 418 U.S. at 250-54, that the First Amendment prohibits the government from targeting the print medium for special regulation to ameliorate the perceived effects of a newspaper publisher's market power — power that the government had no role in creating. It is quite another, however, to suggest as appellants do here, that the First Amendment renders the government impotent to take regulatory steps to prevent a cable operator's private monopolization of a communications medium located on public property.

In fact, it is a cable system's extensive use of public property that gives rise to the requirement that a cable operator, like other similarly extensive users of public property, must obtain a franchise from the government to operate. And as this Court long ago recognized, a franchise is a right of "public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration . . . under such conditions and regulations as the government may impose in the public interest, and for the public security." *California v. Central Pac. R.R.*, 127 U.S. 1, 40 (1888).

In light of the public's substantial interests in the use of public property, it is clear that the First Amendment standards applicable to the print medium are not appropriate for cable television. As discussed further below, *amici* suggest that the proper constitutional standard for reviewing those forms of cable regulation that implicate the First Amendment is the forum standard, and that the utility infrastructure used by cable systems is a nonpublic forum. In the alternative, the Court should fashion a First Amendment standard that recognizes the inherent public property attributes of the cable medium, and the strong governmental interests in ameliorating the inherent market power enjoyed by cable operators, and ensuring that, in return for their extensive use of public property and the other benefits they receive, cable operators are required to serve the public, as well as their own purely private, interests.

II. USERS AND VIEWERS OF PEG ACCESS CHANNELS HAVE SIGNIFICANT FIRST AMENDMENT INTERESTS THAT MUST BE RECOGNIZED IN FASHIONING A CONSTITUTIONAL STANDARD FOR CABLE.

As the legislative history to the 1984 Cable Act states:

> Public access channels are often the video equivalent of the speaker's soapbox or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas.

1984 House Report at 30, 1984 U.S.C.C.A.N. at 4667.

Absent PEG access channels, the public, as well as educational and governmental institutions, would be locked out of the television medium. Only the fortunate and affluent few with the very substantial resources required to be cable operators, programmers, or broadcasters would be able to use the television medium as a vehicle for communications. The vast majority of the American public, unable to own a cable system, a satellite cable programming service, or a broadcast station, would simply be frozen out of the most powerful and popular communications medium of our time. PEG channels thus serve as a small, but vital, window of opportunity for the American public to participate as speakers, and not just as listeners, over the television medium.

Congress noted that PEG access requirements are not content-related, for they work "automatically" and without extensive "government intervention"; PEG channels are "available to all." *Id.* at 35-36, 1984 U.S.C.C.A.N. at 4672-73. Use of PEG access channels does not depend on the views or the identity of the access speaker; any speaker may use a channel regardless of whether that speaker agrees or disagrees with the government, the cable operator, or anyone else. The operator is free to disassociate itself from any and all messages, or from the PEG channel altogether. Moreover, Congress narrowly tailored PEG access requirements by specifically permitting the cable operator to use PEG access channels when they are not being used for their intended purpose. 47 U.S.C. § 531(d).

PEG access channels are uniquely local in nature, and they help communities grow and flourish.[7] They serve as outlets through which people can learn about and express their views on important issues in their communities. Indeed, according to one report, PEG access producers create some "10,000 hours of amateur programs each week."[8] For example, hundreds of Vietnamese families tune into public access each week to see the only television program available in their native language.[9] The disabled and senior citizens use public access channels to raise issues of importance to them and to debunk stereotypes portrayed in other programming.[10] And educational and governmental access channels in particular contribute to "an informed citizenry by bringing local schools into the

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[7]In some communities, all PEG users share one or more channels. In other cities the channels are allocated to the various user groups. No matter how they are managed, the overall character of the channels does not change.

[8]More than one-third of all cable subscribers watch access arts and entertainment, educational, and public affairs programming. Michael Kiernan, *To Watch Is OK, But To Air Is Divine, U.S. News & World Report*, Oct. 16, 1989, at 112. As the *New York Times* reported, "the electronic soapbox is now a vital part of almost 2,000 CATV systems." Douglas Davis, *Public Access TV Is Heard in The Land, N.Y. Times*, June 11, 1989, at H31.

[9]Kiernan, *supra* note 8, at 112.

[10]Quanda Stroud, *The Disabled Making Cable Access-able, NEWS AND VIEWS*, Cincinnati Access Corporation, Summer 1988; Sheinman, *TV Goes Gray at the Grass Roots, 50/PLUS*, Sept. 1987, at 24.

home, and by showing the public local government at work."[11]

Moreover, PEG access channels ensure that the grant of a franchise does not result in the conversion of the public property used by a cable system into a monopoly forum for the sole benefit of one or a handful of private cable operators. After all, the very act of granting a franchise provides the franchisee special privileges, not available to all, and creates a likelihood that the franchisee will obtain sizable speech (and other) advantages. Since this advantage is "the fruit of a preferred position conferred by the Government," *Red Lion*, 395 U.S. at 400, the government should be free to counterbalance it by ensuring that all — not just a privileged few — are able to speak. As the Court long ago held, there is no right to convert public property to private profit-making use, and the placement of wires and cables on public rights-of-way amounts to just such a conversion. *See City of St. Louis v. Western Union Telegraph Co.*, 148 U.S. 92 (1893). The Court has since made clear that government has a compelling interest in ensuring that scarce public resources are used to the

[11] 1984 House Report at 30, 1984 U.S.C.C.A.N. at 4667; *see also* H.R. Rep. No. 628, 102d Cong., 2d Sess. 85 (1992) (PEG access channels serve the compelling governmental interest in "an informed and well-educated citizenry").

maximum benefit of the many, rather than permitting them to fall within the exclusive control of a few.[12]

The must-carry provisions at issue in this case likewise serve the government's substantial interests in fostering local interests and achieving a diversity of programming. However, there are significant distinctions between the must-carry provisions and PEG access requirements. Indeed, in striking down earlier must-carry rules, the D.C. Circuit specifically noted some of those differences, observing that PEG access requirements "serve countervailing First Amendment values by providing a forum for public and governmental interests." *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

PEG access channels, of course, favor no particular class or group of speakers. Rather, they are available to all, and they provide an outlet for communication for everyone in the community, regardless of the access user's viewpoint or the content of the message. For that reason, even if the Court were inclined to rule that the must-carry requirements are unconstitutional, it should also counsel against any extension of such a ruling to PEG access requirements.

[12] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *see also Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) (government may regulate to ensure that those who are given benefits that permit them to speak more effectively do not monopolize or control public debate).

III. ANY FIRST AMENDMENT STANDARD APPLIED TO CABLE TELEVISION MUST RECOGNIZE THE UNIQUE PUBLIC PROPERTY ATTRIBUTES OF THE MEDIUM, AND UNDER SUCH A STANDARD, THE MUST-CARRY PROVISIONS ARE CONSTITUTIONAL.

As discussed above, the cable medium has a unique "nature," and presents "values, abuses, and dangers" not characteristic of any other medium. In particular, cable systems inherently make ongoing and extensive use of vital public property — the utility infrastructure — and in doing so, they exclude other users from that same property. The Court "has adopted a forum analysis as a means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *United States v. Kokinda*, 497 U.S. 720, 726 (1990). *See also International Society for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (recognizing that previous precedent "reflect[s], either implicitly or explicitly, a 'forum-based' approach for assessing restrictions that the government seeks to place on the use of its property"). *Amici* therefore submit that forum analysis provides the appropriate analytical vehicle for

assessing the constitutionality of cable television regulation.[13]

Under forum analysis, there can be little question that the utility infrastructure that cable operators use is a nonpublic forum. This Court's previous decision in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, renders untenable any suggestion that the utility infrastructure used by cable operators is a traditional public forum. And it is equally clear that the utility infrastructure is not a designated public forum, for by neither policy nor practice has that infrastructure been opened "for indiscriminate use by the general public." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). Rather, the utility infrastructure is physically "separat[ed] from acknowledged public areas" and is "a special enclave," subject to special restrictions and uses. *Krishna*, 112 S. Ct. at 2706. Indeed, access to the public utility infrastructure has historically been far more restricted than access to the interior areas of airport terminals, which this Court recently found to be a nonpublic forum in *Krishna*.

Under the nonpublic forum standard, cable regulations must be upheld as long as they are reasonable and "not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 2705-06. The must-carry provisions at issue easily satisfy this test. As the court below

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[13]If the Court is not inclined to apply forum analysis here, it should leave open for future cases the applicability of such analysis to local franchising requirements, since the local public rights-of-way and utility infrastructure used by a cable system are under the control and responsibility of the local franchising authority empowered to grant franchises to cable operators.

noted, all parties — including appellants here — agreed that "the must-carry provisions are not viewpoint-based." *Turner Broadcasting Sys. v. FCC*, 819 F. Supp. 32, 42 (D.D.C. 1993) (emphasis omitted). And while appellants might disagree with the policy conclusions of Congress in enacting the must-carry provisions, the district court was certainly correct in concluding that those provisions represent a reasonable method of ameliorating the perceived adverse effects of cable operators' "position of dominance in the video signal distribution market." *Id.* at 46. The must-carry provisions are therefore constitutional under the nonpublic forum standard.

Should the Court choose not to apply forum analysis, it should nevertheless fashion a First Amendment standard for cable television that gives proper emphasis to the unique public property attributes of the cable medium. Above all else, a cable system is a local broadband communications distribution system situated on public property. Moreover, in most communities, it is a local bottleneck monopoly; that is, were it not for the Cable Act's provisions regarding PEG, commercial leased access, and must-carry channels, the cable operator would enjoy absolute dictatorial control over who may communicate on the cable system. To be sure, some of the activities in which a cable operator engages implicate the First Amendment. *See Preferred*, 476 U.S. at 494. It hardly follows, however, that the First Amendment entitles a cable operator to transform the public property it uses into its own private monopoly over an entire communications distribution medium.

Appellants' fundamental error arises from an inability or unwillingness to distinguish between, on the one hand, the conduit aspects of a cable system as a local monopoly

broadband distribution system placed on public property, and on the other hand, the First Amendment right of a cable operator (like the First Amendment right of everyone else) to communicate messages or programming of its own choosing. A cable operator's status as the owner of a local broadband delivery conduit on public property does not entitle it to preferential First Amendment status as the sole holder of First Amendment rights in the cable medium. Rather, given the unique characteristics of cable, the First Amendment requires only that cable regulation leaves a cable operator with a reasonable ability to communicate messages or programming of its own choosing over that conduit.

Government regulation could satisfy this requirement in several ways. One way would be to treat the cable system as a common carrier network, allowing the cable operator, like everyone else, to lease capacity on the system. In the 1984 and 1992 Cable Acts, however, Congress chose a different approach, and one far more solicitous of cable operators' First Amendment interests. In essence, Congress required a cable operator to set aside a limited portion of its capacity for PEG, leased access and must-carry use, but left the remainder of a cable system's capacity for the operator to program as it pleases.

Thus, when viewed in context, the must-carry provisions are constitutional. They require a cable operator to devote up to approximately one-third of its channel capacity to retransmitting the signals of qualified local broadcast stations. 47 U.S.C. §§ 534, 535. By definition, this leaves the cable operator with control of well over half the channels on its system. And since each broadcaster is entitled to only a single channel, the cable operator enjoys

many times the channel capacity of any other single user of the system. For instance, in a hypothetical fifty-four channel system with eighteen must-carry channels and six PEG access channels, the operator would still control thirty channels — in other words, *thirty times* the communicating capacity of any other user of the system. Surely this enormous advantage over all other users is sufficient to satisfy a cable operator's First Amendment right to communicate programming of its own choosing to the public.

This conclusion becomes all the more obvious when considered in light of the fact that cable operators possess the ability to expand this already built-in channel capacity advantage. Most major-market cable systems in the country already have a channel capacity of at least fifty-four channels, and cable operators are upgrading systems to provide one hundred or more channels. Indeed, the cable industry has boasted of its plans to use digital compression technology to carry hundreds, if not thousands, of channels on systems in the near future.[14]

The constitutional significance of these developments is twofold. First, to the extent that cable operators claim that must-carry rules constrain their ability to carry programming of their choosing in light of current channel capacity, that merely underscores the importance of setting aside channels for others, lest the cable operator convert the public property it uses into a private monopoly over an entire medium of communication. Second, by expanding channel capacity, cable operators have the unilateral ability

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[14] *See, e.g.*, Johnnie L. Roberts *et al.*, *Time Warner Plans Electronic 'Superhighway,'* WALL ST. J., Jan. 27, 1993, at B1.

and incentive to eliminate any constraint that must-carry rules or any other access requirements place on their ability to carry the programming they wish. Indeed, the must-carry (and other cable access) provisions are structured in a way that ensures that the operator will retain complete control over the majority of any new channel capacity it adds to the system. Moreover, the proportionate share of channels over which the operator exercises control will continue to grow as the operator increases channel capacity. To return to the previous example, if the cable operator increases channel capacity from fifty-four to 108 channels, and even in the highly unlikely event that the number of both must-carry and PEG channels also doubled to total forty-eight, the operator would enjoy complete control over sixty channels, or *sixty times* the capacity of any other system user.

The cable programmer appellants nonetheless claim that the must-carry provisions infringe on their First Amendment rights, as distinguished from those of cable operators. *E.g.*, Turner Brief at 20. But the distinction the programmers seek to draw is illusory, for several reasons. First, most of the programmers are themselves owned in large part by cable operators. *See* Appendix to Jurisdictional Statement at 111a-114a. Second, under the cable programmers' own First Amendment theory, their ability to disseminate programming remains at all times entirely subordinate to, and completely dependent on, the editorial discretion of the cable operator. *See, e.g.*, Turner Brief at 20. In other words, even if the must-carry requirements were eliminated, cable programmers' ability to engage in any First Amendment activity via cable would depend entirely on the discretion of cable operators. Finally, the cable programmers completely ignore the fact

that Congress, in crafting a comprehensive scheme of cable regulation, has afforded programmers access to cable channels under 47 U.S.C. § 532, the commercial leased access provisions. That the programmers before this Court have not chosen to avail themselves of this avenue stems from the presumably more favorable economic terms and conditions of carriage that cable operators (with whom most of those programmers happen to be affiliated) have chosen to give them. But cable programmers' desire to preserve the favored economic relationships they enjoy with cable operators, while perhaps understandable, does not present a cognizable First Amendment injury.

Accordingly, in light of the special characteristics of cable television, and because the must-carry provisions leave cable operators and programmers with ample channel capacity over which to communicate their views, the must-carry provisions are constitutional.

CONCLUSION

For the foregoing reasons, the judgment of the United States District Court for the District of Columbia should be affirmed.

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